THE HIGHER COURTS.

Decisions Rendered at the Present Austin Sitting.

THE COMMISSION OF APPEALS.

The Court of Appeals—Hon. John P. White, Presiding Judge; J. M. Hurt and W. L. Davidson, Associate Judges; P. Walton, Clerk.

Court of Appeals.

Henry Epsom vs. the State; from Hill. Burglary. 1. Appellant was found in possession of a pistol identified as proceeds of the burglary, the pistol being left with one Fields at a saloon. The appellant sought to prove by the witness Fields, who had already testified to facts above set forth, that when he left the pistol with witness he told him to deliver it to Ed Coley after he (Coley) became sober, providing the latter called for it, and also that he never claimed ownership over said pistol or exercised any act of ownership over the pistol. Held: In view of the fact that appellant proved that Coley dropped the pistol on the platform and appellant picked it up and went off towards town and left it at the saloon, we think the court erred in refusing to admit the testimony sought to be introduced by appellant. The state showed the act of leaving the pistol at the saloon and the evidence was explanatory of that act. Reversed and remanded. Davidson, J.

Joe Darter vs. the State; from Madison. Assault to murder. 1. The state was properly permitted to prove that on the evening of the assault appellant, in the presence of two witnesses, remarked that he was going to get that much of "Hardshell fat," holding the blade of his knife in his hand, it being shown that the family of the assaulted party were the only members of the Hardshell Baptist church in the neighborhood. It tended to show malice and was admissible. 2. The court in stating the penalty stated it to be "not less than two more than seven years," leaving out the word "nor" between the words "two" and "more." Held: The verdict was for two years, and we do not think the jury could have been misled. The omitted word "nor" was easily supplied from the context. No error. Affirmed. Davidson, J.

Jose Maria Mendez vs. the State; from Val Verde. Murder in the first degree with death penalty assessed. 1. There is no error in the charge of the court stating that "all murder committed with express malice is murder of the first degree, and murder committed in the perpetration of robbery is also murder of the first degree, and this, though the indictment did not charge murder committed in the perpetration of robbery, but charged murder on express malice. Murder in the perpetration of robbery is per se murder of the first degree. [19 App., 400; 17 App., 486; 23 App., 281.] The evidence sufficiently shows murder in the perpetration of robbery. 2. The state had a right to recall appellant as a witness, he having previously testified in his own behalf. By testifying a defendant waives the protection thrown around him as such by the bill of rights and the law and assumes the attitude, place and liabilities attaching to him as a witness the same as any other witness. [Quintano vs. State, 20 App.] Affirmed. Davidson, J.

Sam Hooper vs. the State; from Shelby. Assault to murder. 1. A continuance was properly refused on the ground of the absence of a witness, whose evidence was not probably true, and especially in view of the fact that the facts sought to be established by him were abundantly proven by others on the trial. 2. It being Emancipation day and the car being crowded with negroes, all raising much noise and disturbance, the testimony of a witness that he remarked at the time of the difficulty "that such conduct was intolerable," could not have injured appellant. 3. The charge when construed as a whole sufficiently submitted the issue of specific intent to kill. Affirmed. Davidson, J.

Dick Duncan vs. the State; from Maverick. Murder in the first degree, with the death penalty assessed. 1. The application for continuance was properly overruled. Appellant proposed to prove by Howard, sheriff of San Saba county, who was absent, that he voluntarily surrendered when accused of the murder, and that his reputation in San Saba county was good. It was an undisputed fact that appellant voluntarily surrendered. His neighbors from San Saba county, who knew appellant, were placed on the stand and had the opportunity of proving his good character by them. The absent testimony of the witnesses, Bryan, Miller and Johnson, to the effect that they saw appellant in the western portion of Edwards county on the 21st of February is directly contradicted by the father and brother of appellant, who swore that at said time he was with them in Mexico. The proposed absent testimony of the same witnesses that they saw the Williamson family about the same time is equally as improbable and untrue. 2. The issues presented by the requested instruction were duly submitted in the main charge of the court. 3. The evidence supports the conviction. Appellant attempts to explain where he obtained some of the property found in his possession. He no place explains, or attempts to do so, where he obtained the bed or mattress found in his possession. No motive is shown, but the evidence is conclusive that appellant, acting with others, murdered the Williamson family. Affirmed. White, P. J.

Simon Agar vs. the State; from Hopkins. On rehearing. 1. On a former day this cause was dismissed because no final judgment was shown by the record. It is now shown by a certified copy that the record was erroneous, and that there was a final judgment. The dismissal is set aside and cause reinstated. 2. The matter assigned as perjury in this case is that defendant testified as a witness before the grand jury that he did not, at a time and place specified, say and state to one Gilbert and one Johnson, "that he knew some of the persons who struck said Henry Chase in Hopkins county, Tex., on the night of the 24th day of December, 1890." Other essential allegations were contained in the indictment. Held: A conviction for perjury cannot be sustained where there is no other evidence except proof of the taking of the oath, the giving of the evidence upon which perjury is assigned, followed by proof that at other times the prisoner, when not under oath, made statements, the legal effect of which was to contradict his statements under oath. [Brooks vs. State; decided present term.] The indictment does not set out matter which is material on an assignment for perjury, and the evidence does not support the verdict. Reversed and dismissed. White, P. J.

Archie Washington vs. the State; from Orange. Murder in first degree with life penalty. 1. The overruling of an application for continuance will not be considered in the absence of a bill of exceptions saved to the ruling. 2. The court failed to define in his charge the meaning of the terms "malice" and "malice aforethought." This constitutes reversible error. [27 App., 200; 28 App., 137; 13 S. W. Rep., 650.] Reversed and remanded. White, P. J.

Bill Ainsworth vs. the State; from Trinity. Murder in second degree. 1. The court erred in overruling the application for continuance for want of the testimony of Martha Reese. There was a question as to the identity of the man who did the shooting and it was proposed to be proved by the witness that she followed the man who did the shooting some distance under the impression that he had shot her brother and for the purpose of identifying him. On a former trial when a jury heard this woman testify there was a mistrial. Appellant should have the benefit of her testimony. 2. A charge of the court in a trial for murder which omits to define "malice" and "malice aforethought," essential elements of murder, is erroneous, and such error is not cured by a definition of express and implied malice. [28 App., 137; 27 App., 200; 13 S. W. Rep., 650.] Reversed and remanded. White, P. J.

Milton Mays vs. the State; from Robertson. Murder in second degree. 1. The court did not err in refusing requested instructions. The charge as given was liberal toward appellant. There was no self-defense in the case, yet the court gave appellant the benefit of the defense, and of manslaughter. 2. There was no abandonment of the conflict on the part of appellant, but on the contrary, after the first difficulty he armed and secreted himself where deceased was to pass along, and as he did so, appellant renewed the difficulty, and shot and killed deceased as he walked away, attempting also to fire at the party who was with deceased. 3. It was not error to exclude the testimony that deceased had formerly cut another party with a knife. Affirmed. Per curiam.

Simon Ingram vs. the State; from Grayson. Rape, with ninety-nine years confinement. 1. Two issues were presented by the testimony, an alibi and the identity of defendant. Upon the first issue the evidence was directly conflicting. This being true and the evidence supporting the verdict, we can not disturb the judgment on that ground. The evidence was also conflicting on the other issue. The charge presented the law of the case. No reversible error. Affirmed. Per curiam.

Guadaloupe Lerma vs. the State; from Brewster. Cattle theft. 1. The charge on circumstantial evidence was sufficient. If a more elaborate charge on that question was desired it should have been requested. 2. The court's charge on the question of taking as embraced in the crime of theft was sufficient. 3. The ownership of the property was sufficiently proven to be in Patterson, the foreman of the Hereford cattle company. He had exclusive care, control, etc., of the cattle, and testified that the brand and mark of the stolen cattle were those of the company. There was no objection to this manner of proving the brand. Motion for new trial properly refused. Evidence sufficient. Affirmed. Per curiam.

Cesaria Liero vs. the State; from Brewster. Cattle theft. 1. Companion case to Lerma vs. State, above. The questions in the two cases are the same, save in this case the speech of the district attorney was objected to. The remarks of counsel for the state were proper, being called forth by remarks of counsel for appellant. The argument of the district attorney was doubtless called for by the facts in the case. Affirmed. Per curiam.

Joe Kay vs. the State; from Fannin. Theft of property over $20. 1. Application for continuance properly overruled. Two of the witnesses were present and were not placed on the stand, and the evidence of the others was not probably true. 2. It was discretionary with the court to permit the recall of the witness Entill before the argument had closed to prove want of consent. 3. The theft of the goods was proven by the confessions of the parties in the presence of appellants, and they stated they had been induced to steal by him. They also pleaded guilty. The property was found at appellant's house and in his possession, and part of the goods were in his manual possession when arrested. 4. The question of reasonable explanation of recently stolen property was not in the case. Under the facts it would have been error to have hinged appellant's guilt on such an issue. Affirmed. Per curiam.

S. Martinez vs. the State; from Frio. Murder in the second degree with fifty years confinement in the penitentiary. 1. The court did not err in refusing to quash the special venire. 2. The court gave a full, clear and explicit charge on the law of circumstancial evidence, and hence is not error to refuse instructions on that issue. 3. The evidence showed a murder that would have justified a much heavier punishment. There was no error. Affirmed. Per curiam.

Jim Widdows vs. State; from Hopkins. Assault to murder. 1. On the plea of insanity the charge of the court was full and specific. 2. There was no evidence of aggravated assault. The evidence shows a well formed and planned determination to commit murder. 3. On the defense of intoxication the court gave a much more favorable charge to appellant than was required under the statute. 4. The fact that the deputy in charge of the jury was a nephew of the injured party is explained by the court, and no injury is shown by appellant. 5. While the evidence is circumstantial, it is quite sufficient to sustain the verdict. 6. A verdict arrived at by the jury by means of illegal methods, which verdict was subsequently abandoned and a verdict reached in a legal manner, could not prejudice appellant. Affirmed. Per curiam.

Alfred Debro vs. the State; from Lamar. Forgery. 1. The instrument was altered from a pecuniary obligation for one dollar to one calling for three dollars. The appellant testified in substance that it was not changed when it came into his hands. He testified that he could not write, but witnesses testify that he could write and that they had seen him write. The facts are circumstantial but exclude the idea of innocence and show beyond a reasonable doubt appellant committed forgery. The forgery could not have occurred except at the connivance and with consent and participation criminis of defendant with the party changing the instrument. Affirmed. Per curiam.

Hill Eley vs. the State; from Jones. Burglary. 1. Charge of the court full and fair and favorable to appellant. 2. Evidence supports conviction. Appellant was found in possession of a gun, comb and scissors stolen from the burglarized premises. He gave an explanation of his possession of the gun, but not as to other articles. Affirmed. Per curiam.

Frank Chester vs. the State; from Hopkins. Theft of cattle. 1. Special charges asked and refused, in so far as they are the law, were given by the court in the general charge. The charge as given presented the law applicable to the facts adduced. No reversible error. Affirmed. Per curiam.

Christoval Marques vs. the State; from El Paso. On motion to dismiss appeal. 1. Appellant was charged with aggravated assault and convicted of simple assault. The recognizance recites that he was convicted of aggravated assault. Held: The appeal must be dismissed. So ordered. Per curiam.

C. D. L. Newsom vs. the State; from Jones. Aggravated assault. 1. The information is a valid one and the facts are sufficient to sustain the conviction. No reversible error. Affirmed. Per curiam.

Commission of Appeals.

SECTION A.

Hon. Edwin Hobby, P. J.; W. E. Collard and D. P. Marr, Associate Judges; C. S. Morse, Clerk.

Virginia C. James et al. vs. Margaret C. James et al.; from Grayson. Suit by appellees to recover certain property alleged to be theirs. 1. The court did not err in excluding the evidence of Virginia James to the effect that George James, deceased, had placed certain bank shares in her hands and said he wanted her and the children to have them. Such testimony was admissible neither for her nor her co-defendants. [R. S., 2248.] No by-law of the bank was in evidence to show that such a delivery would pass ownership to the stock. 2. The doctrine in our state is that in the absence of anything showing that a different construction is to be given it, a foreign judgment is held to have the same legal effect as if rendered here. [50 Tex., 561.] 3. It is manifest that from the judgment, verdict of the jury and decree of the supreme court of the Chickasaw Nation, the validity of the nuncupative will of George James and Love's appointment as administrator were the only issues involved in the suit in the Chickasaw Nation. On these points the will was res adjudicata. 4. In the absence of proof of the laws of the Chickasaw Nation, the courts of this state will presume they are the same as in Texas. [1 Tex., 382.] The evidence supports the verdict. Affirmed. Hobby, P. J.

City of San Antonio vs. Sallie Royall; from Bexar. 1. January 1, 1887, appellant, through the market master, leased appellee a stall in the city market. Appellee had possession until March, when she was ousted from possession and her furniture, fixtures, etc., seized. She leased the stall for one year, and punctually paid the rent. The jury gave a verdict in favor of appellee for $500. Held: If the renting of the stall was not in strict compliance with the city ordinance, still appellee was not a trespasser. There was no error in rendering judgment for $500 for appellee, and also for the property. Evidence of loss of profits amounted to more than this. Affirmed. Hobby, P. J.

Western Union Telegraph Company vs. J. R. Stevens; from Cooke. 1. Appellee had cattle near Mendota, Indian Territory, in charge of an agent. He had instructed the agent to ship to Chicago by a given date. Before said date the price of cattle became very depreciated, and appellee sent his agent a telegram countermanding his former orders and telling him not to ship on account of low prices. This telegram was never delivered, and the agent sent the cattle to Chicago, where on account of the low market appellee sustained a loss of $4.50 per head. It was shown that prices were no better during the year. Held: Appellant is responsible for the damage incurred by appellee. The loss was caused through negligence of appellant. There is no error. Affirmed. Hobby, P. J.

W. A. Stewart et al. vs. Owen Morrison et al.; from La Salle. Suit by appellees on administrator's bond. 1. When the probate court has passed all the orders that can be made in that court, upon the subject of the administrator's final liability to the heirs, and orders the amount found to be due to be paid to them, no other judgment can be required of that court. The duty of the administrator is plain; he must pay the heirs as directed by the judgment, and if he refuses to do so on demand, he violates his trust and becomes liable on his bond. The suit was properly brought on the bond in the district court. [R. S., 2049.] 2. The suit was properly brought in the county of the residence of the sureties on the bond. Affirmed. Collard, J.

S. H. Abernethy vs. Mary A. Stone; from Falls. 1. When a certificate is conveyed before it is located and the land is patented in the name of the grantee of the certificate, it would seem that the assignee obtains only the equitable title in the land by virtue of the transfer, and the legal title, though inferior to the equitable title of the assignee, rests in the grantee by reason of the location and patent from the state to him. [52 Tex. 398; 50 Tex., 174; 71 Tex., 51.] Appellant's demand was stale. Affirmed. Marr, J.

Missouri Pacific Railway vs. J. M. Cullars; from Grayson. Suit by appellee to recover for various articles alleged to have been burned by appellant on his place in the Indian Territory. 1. The Indian, Block, having transferred his interest in the property burned to appellee, the latter was entitled to sue and recover therefor. 2. It must now be regarded as the settled law of this state in harmony with the rule of the common law that an action or remedy for injuries done to land situated beyond the territorial limits of this state, and when no part of the act resulting in the injury was committed or performed within the state, is purely local and can not be maintained in any court of this state, but the enforcement of the remedy in such cases must be had within the jurisdiction where the land is situated. [78 Tex., 17.] The court below should have submitted to the jury for their determination the question as to whether the buildings destroyed were a part of the real estate. 3. As to whether the buildings destroyed were a part of the realty was a mixed question of law and fact and should have been presented to the jury for determination. 4. The Indian, Block, had the right to transfer to appellee whatever right he may have had in the property destroyed. [70 Ind., 259; 1 Wash. (Ter.) 325.] 5. Evidence for appellee as to the origin of the fire showed that one witness, three hours after the fire began, traced the fire to its starting point, same being on the right of way of appellant about fifteen feet from the track. On the other hand, appellant proved that the engines passing at the time of the fire had the most approved appliances to prevent the escape of fire, that same were in good working order, and that at the point where it was claimed the fire originated was a down grade and that the engines ran of their own momentum and that they could not emit sparks under such circumstances. Held: The evidence is not sufficient to support the verdict. Reversed and remanded. Marr, J.

A. S. Gazley and wife vs. M. D. Herring et al.; from McLennan. Trespass to try title. 1. The only question in this case is as to whether the conveyance held by appellant to the land in controversy is an absolute deed or only a mortgage. The evidence shows that appellees repeatedly refused to take a mortgage on the ground that it would not be worth the paper it was written on, because the land was homestead property. The deed is absolute on its face. It was conveyed to appellees in full settlement of a fee owing them by Gazley for defending him in a criminal suit. By the execution and delivery of the deed, the relation of debtor and creditor was finally terminated between the parties. While the evidence is conflicting it sustains the finding that the deed to appellees as made by appellants to appellees was a deed absolute. Affirmed. Marr, J.

J. H. Fleming et al. vs. Elizabeth Giboney; from Haskell. Trespass to try title by appellee. 1. A certificate was issued in the name of John Gibney. The name of the grantee who actually received the certificate was John Giboney. Held: "Gibney" and "Giboney" are idem sonans. 2. The recitation of the certificate that Giboney was a single man and resided in Texas on March 2, 1889, is conclusive of both facts. 3. While there is some conflict in the evidence as to the identity of Giboney, the evidence is reasonably conclusive that John Gibney, to whom the certificate was granted, and John Giboney, deceased husband of appellee, is one and the same person. Affirmed. Marr, J.

George R. Allen, guardian, vs. Louisa Von Rosenberg et al.; from Bastrop. 1. The father of Louisa Von Rosenberg, appellee herein, died, leaving a will in which was devised to the latter the land in controversy. The father (Rhode) left his community estate to his wife, she being constituted independent executor with power to settle all claims, etc., against the estate without the intervention of a court. The wife of Rhode was appointed guardian of appellee, Louisa. An inventory of property was returned, embracing the land in controversy. While the guardianship was still pending certain creditors of Rhode came into the district court and ask a divestiture from said Louisa of the title to said land to satisfy certain debts against Rhode's estate. Louisa, the wife of Rhode, and her husband (she having remarried) were made parties. On hearing the court divested appellee, Louisa, of her title to the land, and appointing a trustee directed him to sell the land to satisfy debts against the Rhode estate. Appellants claim through parties who purchased at the sale by the trustee. Appellee, joined by her husband, claims through devise by her father, Rhode. She instituted this suit and recovered judgment for the land. Held: The superior title is in appellee. The proceeding in the district court attempting to divest appellee of her title was a nullity. The property being under the control of the probate court could not be reached by such a proceeding in the district court. The proceeding in the district court was a usurpation of the powers and jurisdiction of the probate court. The devise to appellee it is true was subject to the debts of her father. Her title could have been diverted from her by a sale by the executrix of her father's will or by a proper proceeding charging it with the payment of the debt. Such proceedings were not taken and appellee's title remains unimpaired. No error. Affirmed. Hobby, P. J.